

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAULA THOMPSON)	
Claimant)	
VS.)	
)	
BLUE CROSS & BLUE SHIELD OF KANSAS)	Docket Nos. 166,281
Respondent)	& 166,282
AND)	
)	
FIDELITY & CASUALTY OF NEW YORK)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The respondent and its insurance carrier requested review of the Award dated July 27, 1995, entered by Administrative Law Judge James R. Ward.

APPEARANCES

Claimant appeared by her attorney, Frederick J. Patton of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Bell of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Mark W. Works of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument the parties agreed that claimant sustained no permanent impairment as a result of the June 3, 1992, fall which is the subject of Docket No. 166,282.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 40 percent work disability. The respondent and its insurance carrier asked the Appeals Board to review that award. At oral argument, the issues were narrowed to the following:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent from December 1991 through August 28, 1992, as alleged in Docket No. 166,281.
- (2) Whether claimant provided respondent with timely notice of that accident, and if not, whether respondent was thereby prejudiced.
- (3) Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) The Administrative Law Judge found that claimant sustained a work-related accidental injury "in a series of repetitive use injuries occurring from December, 1991 through August 28, 1992." The Appeals Board agrees with that conclusion. The greater weight of the evidence establishes that claimant developed overuse injury, including bilateral carpal tunnel syndrome and possibly bilateral thoracic outlet syndrome, to her upper extremities while working for the respondent and performing computer keyboarding activities during the time period of December 1991 through her last day of work on August 28, 1992. This conclusion is based upon both claimant's testimony describing the onset and progressive worsening of symptoms as she continued to work and the testimony of P. Brent Koprivica, M.D., who attributed claimant's injuries to her work.

The respondent and its insurance carrier argued that claimant's symptoms were caused by her being pregnant. The Appeals Board disagrees. Although pregnancy is a potential for causation, claimant's overuse symptoms developed before she became pregnant and did not resolve after she delivered in March 1993. Dr. Koprivica, who saw claimant in October 1993, testified that if the pregnancy were the cause of the symptomatology, one would expect the symptoms to generally resolve within three months of delivery which has not occurred. Therefore, the Appeals Board finds that it is more probably true than not true that claimant's work activities caused or contributed to the overuse syndromes to the upper extremities that have developed.

(2) The Appeals Board finds claimant sustained a work-related injury as a result of repetitive mini-traumas during the period of December 1991 through August 1992 with the date of accident designated as claimant's last day of work for the respondent on August 28, 1992. Claimant testified that she notified her supervisor in December 1991 that

her upper back was hurting. Claimant also testified she began experiencing symptoms in her hands and arms approximately two or three weeks later. Although it is not clear whether claimant reported those symptoms to her supervisor when they initially began, it is apparent claimant had reported those symptoms to the respondent by mid-March 1992 as respondent then referred claimant for medical treatment. The Appeals Board finds claimant continued to perform repetitive hand activities through her last day of work and, thus, continued to sustain additional injury. The Appeals Board finds that respondent had timely notice and knowledge of claimant's work-related accidental injury as it actually developed.

(3) Without much explanation, the Administrative Law Judge found that claimant sustained a 40 percent work disability. The Appeals Board finds that claimant's work disability is 48 percent.

The company doctor, Dr. Doug Frye, did not place permanent work restrictions upon claimant but gave her a 14 percent whole body functional impairment rating for her work-related injuries. After rejecting respondent's argument that claimant needed no permanent work restrictions, the Administrative Law Judge adopted Dr. Koprivica's opinion concerning what restrictions and limitations claimant should observe. The Appeals Board finds no reason to disturb that finding and analysis.

In his report dated October 6, 1993, which the doctor specifically references at deposition, Dr. Koprivica writes:

"At this point with the difficulties she has been having in both upper extremities, it is my opinion Ms. Thompson is advised to avoid repetitive upper extremity usage. In particular, she should avoid exposure to vibration as with air-driven tools. She should avoid repetitive pinching, wrist flexion/extension, repetitive ulnar deviation of the wrist or forceful gripping. She is having symptomatology in her elbows and shoulders as well and I would recommend she avoid repetitive flexion/extension of the elbow as well as forceful forearm supination/pronation or wrist dorsiflexion. Finally, she should avoid repetitive pushing and pulling of the upper extremity. She should also avoid sustained or repetitive activities above shoulder level of a weighted or unweighted variety."

Because hers is an "unscheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages

comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

As determined by the Administrative Law Judge, both claimant's and respondent's vocational rehabilitation experts agree that claimant has lost 63 percent of the ability to perform work in the open labor market utilizing Dr. Koprivica's work restrictions. The Appeals Board finds that testimony persuasive for the first prong of the formula for computing permanent partial disability benefits quoted above.

Regarding loss of ability to earn a comparable wage, the Appeals Board finds that claimant has lost 33 percent of that ability. The Administrative Law Judge found that claimant's average weekly wage on the date of accident was \$290.56. Because that finding was not contested by any party, it is adopted by the Appeals Board. The Appeals Board finds that claimant retains the ability to earn \$4.90 per hour or \$196 per week which is the hourly rate claimant is now earning while working for Wal-Mart. The Appeals Board finds that \$196 per week properly reflects claimant's post-injury wage earning ability. Comparing the difference between \$290.56 per week and \$196 per week, the Appeals Board finds a difference of approximately 33 percent which should be used for the second prong of the formula for computing permanent partial disability benefits.

Averaging the 63 percent loss of ability to perform work in the open labor market with the 33 percent loss of ability to earn a comparable wage yields a permanent partial disability of 48 percent which the Appeals Board finds appropriate to award benefits in this proceeding.

(4) Claimant has not established that she is entitled to an award of permanent partial disability benefits for the June 3, 1992, accident as alleged in Docket No. 166,282. Claimant raised no issues in her brief for the Appeals Board to address regarding that accident.

(5) The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge as set forth in the Award to the extent they are not inconsistent with those specifically made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 27, 1995, entered by Administrative Law Judge James R. Ward should be, and hereby is, modified; that claimant is entitled to an award of permanent partial disability benefits for a 48% work disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Paula Thompson, and against the respondent, Blue Cross & Blue Shield of Kansas, and its insurance carrier, Fidelity & Casualty of New York, for an accidental injury which occurred August 28, 1992, and based upon an average weekly wage of \$290.56 for 415 weeks at the rate of \$92.98 per week or \$38,586.70, for a 48% permanent partial disability.

As of October 31, 1996, there is due and owing claimant 217.86 weeks of permanent partial compensation at the rate of \$92.98 per week in the sum of \$20,256.62, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$18,330.08 is to be paid for 197.14 weeks at the rate of \$92.98 per week, until fully paid or further order of the Director.

Claimant is denied an award of permanent partial disability benefits for the June 3, 1992, alleged accident.

The Appeals Board hereby adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton, Topeka, KS
Mark A. Buck/Gregory D. Bell, Topeka, KS
Mark W. Works, Topeka, KS
Administrative Law Judge, Topeka, KS
Philip S. Harness, Director